IN THE SUPREME COURT

Request from the United States Court of Appeals
for the Ninth Circuit for a Certified Question

Honorable Barry G. Silverman, Circuit Judge

PETER DEACON,

Plaintiff-Appellant,

v. Docket No. 151104

PANDORA MEDIA, INC.,

Defendant-Appellee.

Reply Brief on Merits of Certified Question – Appellant

ORAL ARGUMENT REQUESTED

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Pursuant to MCR 7.212(G), Deacon replies to Appellee's Response Brief filed on July 29, 2015 (the "Response Brief" or "Resp Br") as follows:

I. ARGUMENT

Pandora asks for this Court's judicial imprimatur on its widespread disclosure of its users' music listening habits. But as Deacon explained in his opening brief on the merits ("Opening Brief" or "Op Br")—and as Pandora does not dispute (or even address)—Michigan has a long tradition of protecting individuals' privacy rights and their interest in not having their affairs known to others. (Op Br at 6.) This interest extends to consumers' choice in music, as the Michigan legislature expressly recognized when enacting the Video Rental Privacy Act ("VRPA"), MCL 445.1711 through MCL 445.1715. (Op Br at 7) (quoting House Legislative Analysis stating that "[m]any in Michigan … believe that one's choice in … records … is nobody's business but one's own"). Consequently, the VRPA prohibits companies "engaged in the business of selling at retail, renting, or lending … sound recordings" from disclosing information concerning those transactions that indicate the identity of the customer without first getting consent. MCL 445.1712.

Pandora seeks this Court's approval for the unlimited ability to disclose its users' listening habits by arguing that it is not in the business of renting or lending sound recordings. But Pandora's position borders on the ridiculous, given its admission that it temporarily places a sound file on a user's computer, and subsequently removes the file when the user is finished listening to the recording.

(See Resp Br at 3.) Giving something and taking it back some time later is lending under any definition of the term. (Op Br at 11-14.)

Pandora tries to turn the "lending" inquiry into a question of whether its listeners "use" or "control" the sound recording it gives and takes back from them. But aside from not being the inquiry required by the statute, Pandora's "use" and "control" analysis is flawed. Pandora's listeners "use" and "control" the song files simply by playing the music and listening to it. While Pandora asserts that its listeners do not have *total* control over the sound recording, "control" does not require "total control" and, in any event, all of Pandora's factual assertions regarding listeners' lack of total control are outside the current record.[1]

Ultimately, Deacon will have to establish at trial in the federal action that Pandora is in the business of renting or lending sound recordings. See Hon. William

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[1] Pandora has a profound misunderstanding of the difference between "legislative" and "adjudicative" facts, and which can be considered by an appellate court or a lower court on a motion to dismiss. This remains so even after having demonstrated its misunderstanding by filing a meritless brief on the issue in the Ninth Circuit. (Appx at 10a.) "Adjudicative facts are facts about the parties and their activities . . . Legislative facts do not usually concern only the immediate parties but are general facts which help the tribunal decide questions of law, policy, and discretion." *Marshall v Sawyer*, 365 F2d 105, 111 (CA 9, 1966); see also *Castillo-Villagra v INS*, 972 F2d 1017, 1026 (CA 9, 1992). Adjudicative facts can only be judicially noticed or considered under extremely limited circumstances (which do not apply here). See FRE 201; MRE 201. As such, Pandora cannot rely on untested assertions about how its service functions simply because it choose to improperly insert them into its motion to dismiss. On the other hand, citations to library websites showing that libraries lend music or don't charge to borrow books, are not evidence concerning Deacon, his claim, or Pandora; they refer only to general facts relevant to legal reasoning, namely determination of the meaning and use of the terms "renting" and "lending" in the VRPA. The use of such sources is commonplace in American appellate practice. See Judge Cathy Cochran, *Surfing the Web for A "Brandeis Brief": the Internet and Judicial Use of Legislative Facts*, 70 Tex BJ 780, 781 (2007).

B. Murphy & John Vanden Hombergh, *Michigan Non-Standard Jury Instr Civil § 32:10* (2014).[2] But the issue currently before *this* Court is simply whether Deacon has sufficiently alleged that element in his complaint. Under both federal and Michigan pleading standards, all allegations in the complaint must be taken as true and all reasonable inferences must be drawn in favor of the plaintiff. (See Op Br at 8-9.)

In short, Pandora wants this Court to hold—as a matter of law, before any facts or evidence have been developed through discovery—that Pandora's admitted giving and taking back of sound files does not constitute renting or lending sound recordings under the VRPA. This the Court cannot do. Instead, this Court should answer the Ninth Circuit's certified question by responding that, yes, on the facts as alleged in Deacon's complaint, Pandora is in the business of lending sound recordings under the VRPA.

A. Giving and Taking Back a Sound Recording is "Lending" It.

Pandora acknowledges—indeed trumpets—Deacon's allegation that it "places a temporary music file on the listener's hard drive" and "removes the music file when it is done streaming." (Resp Br at 3.) The inquiry should end here. Giving

[2] The California federal court will be bound by Michigan jury instructions. See *In re Asbestos Cases*, 847 F2d 523, 524 (CA 9, 1988) ("State law controls the substance of jury instructions in diversity cases.").

something to someone—like a sound recording—and later taking it back is the very essence of lending.[3]

Suppose, for example, that Deacon tells a friend—let's call her Pandora—that he likes jazz music. Suppose further that Pandora brings him a CD of jazz recordings that she thinks he would like. She leaves the CD at his house, returns the next day, and retrieves it. There is no doubt that in giving him a CD and later taking it back, Pandora lent Deacon a sound recording. So too in the case alleged here: Pandora placed an electronic sound file on Deacon's computer and, after he listened to it, removed it. As explained in Deacon's Opening Brief, this is consistent with both dictionary definitions and common understandings of the word "lend." (Op Br at 11-14.) For this reason alone, this Court should hold that Deacon has met his burden of pleading that Pandora is in the business of lending sound recordings.

B. "Use" and "Control" are not Elements of the VRPA and, In Any Event, Pandora Listeners Do Use and Control the Borrowed Sound Recordings.

Perhaps recognizing that its conduct falls within the ordinary meaning of "lending," Pandora tries to shift the focus of the inquiry to whether Deacon has "use" or "control" over the sound recordings that Pandora undisputedly gives to and takes back from him. For example, Pandora asserts that "[t]he relevant inquiry is … whether Plaintiff can plead facts showing that he has control over the songs that Pandora streams to his device." (Resp Br at 4.) But that simply is not true. The

[3] Pandora does not (nor could it) contend that the "music file" it admittedly places on and later removes from a user's hard drive is not a "sound recording" under the VRPA.

relevant inquiry is whether Plaintiff has alleged that Pandora lends sound recordings. The terms "use" and "control" are not in the VRPA; the terms "lending" and "borrowing" are. MCL 445.1712. Indeed, given that the statutory term "lending" is a word "generally familiar to lay persons and … susceptible of ordinary comprehension," the jury at an ultimate trial will simply be asked whether Pandora is in the business of lending sound recordings, not whether its listeners "use" or "control" those recordings. See *People v Martin*, 271 Mich App 280, 352; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008); see also *United States v Hernandez-Escarsega*, 886 F2d 1560, 1571-72 (CA 9, 1989) (holding that statutory terms were "neither outside the common understanding of a juror, nor so technical or ambiguous as to require a specific definition").

In any event, even if looking beyond the term "lending" were appropriate, Pandora listeners do "use" and "control" the sound recordings. Listening to a sound recording is "using" it, and listeners have "control" over the recording in that they can play, pause, or skip it.[4] (Op Br at 20-21 and n 14.) Pandora seems to argue that anything less than total control is not control but provides absolutely no basis for such an understanding. For example, Pandora asserts that "[t]o show control … Plaintiff needed to plead facts showing that Pandora listeners can choose songs, which they can then download and play for a period of time, rewinding and replaying if they like." (Resp Br at 4.) But Pandora makes this assertion without

[4] Users also have control over the sound recordings because they can copy them. (See Op Br at 9-10 n 2.) While Pandora correctly notes that such copying would be unlawful (Resp Br at 3 n 4), lack of *authority* does not mean lack of *power* (i.e., control).

any citation or explanation of why choosing particular songs, rewinding, and replaying are the sine qua non of control over a sound recording, while playing, pausing, and skipping are not.[5]

The short of it is, Pandora undisputedly places a sound recording on a user's computer, which it later removes. While it is on the user's computer, the consumer "uses" and "controls" the sound recording simply by listening to it immediately, pausing it to listen to it later, or skipping it to listen to another sound recording placed on his computer by Pandora. See *Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc*, 303 Mich App 441, 448; 844 NW2d 727 (2013) ("The term 'use' requires only that a person 'employ for some purpose.'") (quoting *Random House Webster's College Dictionary* (1992)). Consequently, even if "use" and "control" were the relevant test, it is met here.[6]

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[5] In any event, Pandora's assertions that its users purportedly cannot do certain things with respect to the sound recordings—such as rewinding or replaying—are "adjudicative facts" not part of the complaint. (See Op Br at 9-10 n 2.) And as noted above, all allegations in the complaint must be taken as true and all reasonable inferences must be drawn in favor of the plaintiff. Rather than answer the question certified, Pandora wants this Court to try the case and hold that Pandora users lack control over the sound recordings it temporarily gives to them *based on purported facts not contained in or inferable from the complaint*. To the extent that these purported outside facts are ultimately relevant to the inquiry as to whether Pandora "lends" sound recordings, that inquiry cannot be answered on a motion to dismiss (which was the motion on which the federal district court ruled), and must instead await discovery as to the truth of Pandora's factual assertions. Simply put, if these outside facts matter, this Court cannot rule that—*as a matter of law*—Pandora does not "lend" sound recordings.

[6] That control over digital media need not be total control was confirmed by this Court in *People v Flick*, 487 Mich 1, 14; 790 NW2d 295 (2010) ("Dominion or control over the object need not be exclusive."). In that case, this Court held that computer users had control over pornographic images viewed on their monitors. In the same way, Pandora users have control over songs to which they listen on their

C. Exempting Pandora from the VRPA's Coverage Would Completely Undermine the Purpose of the Statute.

Finally, reading the VRPA so as to exempt Pandora from its proscriptions would eviscerate the privacy interests the statute seeks to protect. As this Court has explained, "[t]he overriding goal of statutory interpretation is to ascertain and give effect to the Legislature's intent." *People v Flick*, 487 Mich 1, 10; 790 NW2d 295 (2010). Here, the Legislature's intent is clear. In protecting sound recordings along with books and movies, the Legislature explicitly recognized that Michiganders' choices in listening materials are "a private matter, and not a fit subject for consideration by gossipy publications, employers, clubs, or anyone else, for that matter." (Appx at 168a.) The purpose of the statute is to prevent those from whom we obtain our music from disclosing without our consent those choices to our friends and neighbors, our coworkers and business associates, or to data miners and advertisers without our consent. Whether one's choices include Christian gospel music or hardcore gangster rap, Broadway musical numbers or Motown, the Legislature placed control over that information squarely with the listener, not the music provider. Given the rapid rise of digital music delivery as the medium of choice for listeners (see Op Br at 29 n 17), exempting internet music providers like

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computer. While Pandora attempts to distinguish *Flick* on the ground that the pornography viewers in *Flick* took "many intentional affirmative steps" to gain control over the images (Resp Br at 8) (quoting *Flick*), Deacon and other Pandora users likewise took intentional affirmative steps to gain control over songs by navigating to Pandora's website, registering for an account, and building a customized "station" (Appx at 140a). Intentionally browsing a website (never mind creating an account and a personalized station) is alone an affirmative step sufficient to gain control over the material on that website. See *Flick*, 487 Mich at 18 n 11.

Pandora from the VRPA's restrictions plucks that control right back out of listeners' hands in contrast to the clear intent of the Legislature. This Court should refuse to endorse Pandora's attempt to gut the statute in this way.

II. CONCLUSION

For the reasons discussed in Deacon's Opening Brief and above, this Court should answer the certified question by instructing the Ninth Circuit that Deacon has indeed stated a claim against Pandora for violation of the VRPA.

Dated: August 19, 2015

Respectfully submitted,

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